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LABOR, CAPITAL, AND BUSINESS AT COMMON LAW

THAT labor, capital, and business are in some way related scarcely any one will dispute, but that a common law principle binds them together requires demonstration to lawyers no less than to laymen. For such a task less assistance is to be derived from the regular channels than might properly be expected, for lawyers as a class have not penetrated beneath the surface of the difficulties, nor, it must be confessed, have they shown any special aptitude for handling or success in dealing with them, if the results of the past twenty-five years may be accepted as a criterion. By comparison the activity and fertility of suggestion on the part of political economists, sociologists, and reformers of all classes have been so great that it is with some misgiving that one approaches the subject from a merely legal point of view. This very activity, however, has provoked a remonstrance from at least one jurist — Berolzheimer — who contends that:

"The exaggerated importance attached to 'society' and to 'social ethics' resulting therefrom, is . . . due to the fact that too many non-jurists occupy themselves with the philosophy of government and law, and therefore are disposed to replace the definite, though complex and difficult conception of government and law by the more elastic and vague one of society. 'Society' is more readily managed; it is like a lay figure upon which any sort of garment may be neatly fitted. The definiteness of legal concepts gives way to the foggy confusion of social-political, social-reformatory, and social-ethical discussions, fertile in proposals

that prove to be valueless and ineffective when philosophically tested. A return to legal and economic philosophy remains the sole scientific procedure." [1]

Almost the only serious investigation at all connected with this field that has been made by lawyers has related to the regulation of "public" callings, — but this has been primarily a study of regulation, not of business, and as shown in a previous article,[2] the results as regards business are greatly impaired because of the circuitous reasoning employed: — A business is public, and it is "within the functions of government," therefore it may be regulated. It may be regulated, it is within the functions of government, therefore it is public. If it is under a duty to serve impartially it is public, and if it is public it is under a duty to serve impartially. "Private" business is under no duties at all — it is even beyond the reach of the legislature.

Such an employment of the word "public" is obviously useless in a study of business as such. The thing to be discovered is the inherent nature of business, and the relationship in which it stands to the public — whether it concerns the public or only a particular individual — whether it is a private or a communal interest. As Professor Pound, in his learned articles in this REVIEW dealing with Sociological Jurisprudence, has said:

"A legal system attains its end by recognizing certain interests, — individual, public, and social, — by defining the limits within which these interests shall be recognized legally and given effect through the force of the state, and by endeavoring to secure the interests so recognized within the defined limits. . . . Undoubtedly the progress of events and the development of government increase the demands which individuals may make, and so increase the number and variety of these interests. But they arise, apart from the law, through the competition of individuals with each other, the competition of groups or societies with each other, and the competition of individuals with such groups or societies." [3]

In other words, as we may take it, a high state of civilization is of itself indicative of a multitude of new relationships between the members of the community, which it is the business of law and

[1] THE WORLD'S LEGAL PHILOSOPHIES, Modern Legal Philosophy Series, vol. 2, p. 380.

[2] "Business Jurisprudence," 28 HARV. L. REV. 135.

[3] 28 HARV. L. REV. 343, 344.

lawyers to recognize and adjust. In the simpler and more primitive conditions of communal association, the corresponding relationships are recognized as by instinct and the rights with which the community endows them are enforced by custom. But as the community grows, the resulting complexity of affairs produces a change, and the interdependency of the members becomes obscured at the very time that the claim of each upon all the others becomes more real as well as more vital. Instinct no longer suffices to produce a reaction in customary conduct. The discovery of the true relationships, the recognition of proper interests, and the statement in the form of law of the rights which the community concedes by virtue of this recognition, require an intelligent, yet sympathetic analysis of actual conditions, and this becomes the lawyer's task, and is the ultimate end of a legal system.

From its very nature the common law is peculiarly adapted to serve as the medium for the attainment of the ideal which Professor Pound has described, and because labor, capital, and business are so closely identified with the primal activities of civilized man, this is the field above all others in which the validity of the above analysis may be best tested and illustrated, and the one in which the real attitude and capacity of the legal system which we now enjoy may be most profitably examined.

In the former article a study was made of the "business" operation as such, with respect to its proper relationships. We there saw that in the nature of things and by the common law, in fact no less than in theory, all business is public. We found that business at common law consists in the undertaking and conduct of a community or public service for profit, and hence it is the duty of every one who takes upon himself a "public employment," that is, a business, "to serve the publick as far as the employment extends." [4] The duty arises from the undertaking, the profession, and not from the necessities of the community, as often supposed. To carry on a business is to exercise a privilege. The right of a person to do with his own as he chooses need not be disputed. But the business man deals with what is not his own. He emerges from his privacy, involves the fortunes of the community with his own, and by so doing assumes an obligation to the public. He ceases to be a private, and becomes a "common" or public personage.

[4] Holt, C. J., Lane *v.* Cotton, 1 Ld. Raym. 646, 654 (1701).

In early times, perhaps more frequently than at the present day, many occupations were carried on for the particular benefit of the family; many, such as weaving, were carried on within the household. There were, for example, private carriers and public carriers; private inns and public inns; private mills and public mills; private tailors and public tailors; private smiths and public smiths. This accounts for the frequent occurrence in the reports of the terms "common" carrier, "common" inn, "common" mill, "common" tailor, "common" smith, and the like — expressions employed solely by way of indicating an express undertaking to serve the community and without any implication as to peculiar subjectability to legislative control. And so to-day if we followed the analogy and wished to distinguish business concerns from non-business concerns we would say "common bank," "common insurance," "common garage," "common steel works," "common stock-yards," "common water works," "common railroad," "common express," "common factory," "common store," "common warehouse," and so on.

In the article referred to, emphasis was placed upon business as such, as an institution, so to speak, or organ in the system of production and exchange, discharging a community function.[5] The fact that businesses are carried on by individuals, sometimes acting singly and at other times in various forms of association — partnerships and corporations in common law countries and more varied

[5] The article on Business Jurisprudence did not prescribe a treatment for any special problem of business, nor was it a diagnosis of the ills of business. It was a physiological rather than a pathological study of business itself, and the true meaning of that study is not that a particular evil is to be treated thus and so, but that no real treatment can be given any evil of business, nor (what is even more important) can business be kept in a state of health, unless its true nature is understood. It was indeed suggested that a consistent application of the principle that all business is public should tend to promote the solution of modern trade problems and especially that branch of them which has to do with business combinations. But the problems arising out of modern industry are more complex than commonly supposed. Epitomized in the term "Trust" they do, it is true, have to do with the grouping, correlation and co-ordination of businesses, and their duty to serve each other, no less than private consumers. But they also have to do with the time, manner and conditions of work, the employment of capital and the general relations of the business process to the community itself — facts quite generally overlooked.

The present study is similarly not intended as a prescription for any particular evil associated with labor or capital or the subject or condition connoted by the expression "labor and capital." It is primarily a study of the nature and especially the legal nature of "labor and capital."

forms elsewhere — was properly disregarded as an accidental circumstance. It was shown that at the common law as interpreted down to a comparatively recent date the mere fact of engaging in business implied a duty to serve all comers without unreasonable discrimination, an idea in marked contrast with those entertained to-day when we find the cases, especially those involving labor and capital controversies, teeming with such expressions as "a man's business," "his business," "interference with his business," "private business" and the like, — expressions implying a proprietary right in a given business to the exclusion of all communal interests.[6] To-day only a limited number of businesses are regarded as public, and then only in the sense of liability to special legislative control, and not at all in the sense of being subject to duties under the common law based upon the mere fact of undertaking to serve the community. The courts to-day do not recognize that businesses as such are subject to any duty. The decisions are in great confusion on this account and our "public service" and "public utility" law is largely a law of pipes, rails and wires. If we can imagine a time when the citizen in his residence will open a faucet

[6] *Cf.* Barr *v.* Essex Trades Council, 53 N. J. Eq. 101, 112, 113, 114, 30 Atl. 881, 885 (1894). "A man's business is property. . . . Mr. Barr's business of publishing the paper with the incidents of its circulation and advertising, was as much his property as were the type and presses upon which the paper was printed. . . . It was Mr. Barr's personal right, without interference or dictation from any person or persons, to employ, in the prosecution of his business, such mechanical appliances as were safe and healthful, and to employ in the production of his paper, such persons and lawful means as he might choose. . . . This freedom of business action lies at the foundation of all commercial and industrial enterprises — men are willing to embark capital, time and experience therein, because they can confidently assume that they will be able to control their affairs according to their own ideas, when the same are not in conflict with law. If this privilege is denied them, if the courts cannot protect them from interference by those who are not interested with them, if the management of business is to be taken from the owner and assumed by, it may be, irresponsible strangers, then we will have come to the time when capital will seek other than industrial channels for investments, when enterprise and development will be crippled, when interstate railroads, canals and means of transportation will become dependent on the paternalism of the national government and the factory and the workshop subject to the uncertain chances of coöperative systems."

Lockner *v.* New York, 198 U. S. 45, 53 (1905), is to the same effect: "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Allgeyer *v.* Louisiana, 165 U. S. 578. . . . The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right."

or valve to draw from some central reservoir his steam, gasoline or hot water, or any of the liquids consumed in his household; or by dropping a coin in a slot be able to receive instantly any of the articles of food or clothing to be found in the modern department store; or by pressing a button be able to witness the baseball game of the afternoon or hear the evening's operatic performance — one can readily understand that the popular and judicial conception of which community functions are private and which are public would undergo modification, and this quite regardless of whether the services were rendered over public or private rights of way or by invisible means. But it must be apparent that while this transference of the service from the point at which it originates to the place where it is enjoyed might aggravate the inconvenience of having it cut off or denied and excite a more strenuous assertion of a legal right to the service, it would not create the right nor make that public which was not public before.

All business is public, regardless of the disguise under which the function is performed and is subject in consequence to rights and obligations with respect to the community. And from this it must follow that the factors or constituent parts of business stand in this same public relation.

That capital is one of these factors will scarcely require argument. It is in truth the fund with which and to increase which business is carried on,[7] the thing which the business man "turns over," as the phrase goes, in order to reap a profit. Indeed the records of the ancient trading communities from which most of the cities throughout the world have sprung, and many of which were in all probability contemporary with the more strictly agricultural settlements to be spoken of presently, furnish ample evidence of the general recognition and enforcement of this public interest.[8] There were many trading towns in England — "*portubus supra mare, villis mercatoriis et burgis*" — whose founding antedates all records,

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[7] *Cf.* 2 MARSHALL, PRINCIPLES OF ECONOMICS, ch. 4, and app. E.

[8] The connection between business and the very existence of communities has in fact been so close that one might almost be said to be the cause of the other. Compare Montesquieu's statement (2 ESPRIT DES LOIS, bk. 21, ch. 5) that "The history of commerce is that of the communication of people" with the classic remark of Chief Justice Marshall: "Commerce undoubtedly is traffic, but it is something more; it is intercourse."

where the Law Merchant prevailed [9] and among which may be mentioned London, Bristol, and Norwich. In the thirteenth century these settlements were already seats of a bustling business activity. In such places we find strict laws against forestalling, regrating and engrossing, all of which were directed toward preventing one person from obtaining an unfair advantage over the others in the same occupation or interfering with the due course of trade to the injury of the public or the business men;[10] there were arrangements for "common" buying, that is buying under and for the order of the commonalty, the product purchased being divided proportionally or in case of difficulty by lot.[11] As quaintly expressed

[9] See ch. 1 of LEX MERCATORIA (12th or 13th century?), printed in THE LITTLE RED BOOK OF BRISTOL, vol. 1, p. 57 *et seq.* "Lex mercatoria a mercato peruenire sentitur, et inde primo sciendum est vbi mercatum se tenet de quo huiusmodi leges proueniunt; vnde adueretendum est quod mercatum huiusmodi se habet in quinque locis tantum, scilicet in Ciuitatibus, nundinis, portubus supra mare, villis mercatoriis et burgis, et hoc racione mercati vnde vlterius est videndum, quod sicut mercatum se habet in v. locis, ita semper sequitur lex mercatoria siue lex mercati, videlicet quia in ciuitatibus et nundinis siue feriis quod idem est fiunt empciones et vendiciones merçandisarum continue, scilicet, vestium, victualium et quasi omnimodorum bonorum mobilium; . . . Ad leges istas pertinent naturaliter omnia placita preter placita terre tantum. Sed si domini et partes placitantes maius voluerint deducere et prosequi placita de appellis in dictis locis coram eis inchoata in aliis curiis ad communem legem et recusare legem mercatoriam bene possunt et ita faciunt communius quam aliter per totum regnum."

[10] LEET JURISDICTION IN NORWICH (Selden Society), pp. 30, 47, 63, 65. John Janne is amerced "because he forbars the-men of the city from the purchase of tallow, whereby the market is diminished"; Ranulph, the fish-monger, "because he went outside the town by Carrow to meet a boat full of fish and there he bought it contrary to the proclamation against the heighening of the market of Norwich"; John de Gaywood, taverner, because he "forestalled so many eggs in the market that he filled 28 barrels at divers times and sent them out of the kingdom to foreign parts, and likewise forestalled butter and cheese to a large amount, whereby there accrued great dearness of victuals in the city and that for four years"; and Roger Calf because he was "wont to buy oysters by forestalment in divers boats, so that when one boat is at the Staith for the sale of (oysters) another boat or two shall be at Thorpe until the first boat is emptied and sold, and then the rest of the boats come up for sale; and whereas the common people (were wont) to have 100 oysters for 1½d., Roger sells them for 2d. or 3d. (elsewhere)." . . .

The above instances date from the 13th and 14th centuries.

[11] In Sandwich (2 BOROUGH CUSTOMS, Selden Society, p. 179) it was enacted "that if any merchant, neighbour or stranger brings any merchandise to the town or port, all of the town who were present at the sale of the goods, and likewise those whose share is claimed for them by those present there, although they themselves are absent, shall share the merchandise equally among themselves, whether for gain or for loss, provided those present claim a share in the purchase."

See 1 GROSS, THE GILD MERCHANT, pp. 135–138, to the effect that this was a common practice in England, Scotland, Ireland and Wales and for numerous examples.

in the records of Waterford, "The Maire and balliffs duryng the yere shold be commene bieres of al merchandise commyng unto the said citie, and to distribute the same upon al citsains and commynalte of the same, as they shall see behouffull." [12] The duty of impartial service to each in his turn was imposed alike on carriers and workmen, masters, wage earners and journeymen.[13] The by-laws of the craft and merchant gilds are to the same effect, and frequently provided for the sharing of bargains, the segregation of distinct businesses, and other methods of control over the capital employed by one member in competition with another. Typical provisions from the elaborate code of the gild of Berwick-upon-Tweed, dating from the thirteenth century, are printed in the note.[14]

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[12] 2 BOROUGH CUSTOMS (Selden Society), p. 167 (15th century).

[13] BEVERLEY TOWN DOCUMENTS (Selden Society), pp. 56, 57 (A.D. 1467). . . . "It was ordered moreover that if any burgess of the aforesaid town wish to have and hire any carpenter or tiler, sawyer or panner, a master or a wage earner, viz. journeyman, or any other workman in the aforesaid town to do work for him, the aforesaid carpenter, tiler, sawyer, or panner, whether master or his wage-earner and workman, shall not refuse to come to the work of the aforesaid burgess and work with him, unless they have been previously retained for someone else's service and work; and any refusing to do so shall pay 6s. 8d. to the community of the aforesaid town, as often as he shall have been found guilty in that behalf before the governors of the aforesaid town." . . .

"Also, it was ordered that if any carrier, porter, or creeler of the aforesaid town shall be ordered, or have notice given him, by any burgess of the aforesaid town to carry merchandise or other things and goods of any kind belonging to the same burgess, he shall serve the same burgess first in such carrying, unless he shall have been before employed in carrying for another burgess of the aforesaid town, and then, after finishing his carrying for the first burgess he shall carry for the second, and not depart from carrying until he has finished all the carriage for the same burgess; and if he presume to do so he shall pay 6s. 8d. to the community aforesaid, as often as this shall be established with reasonable certainty before the Governors in the Gild Hall." . . .

[14] SMITH, ENGLISH GILDS, ch. 18, p. 339. "All shall be as members having one head, one in counsel, one body, strong and friendly. . . . Whoever shall fall into old age or poverty, or into hopeless sickness, and has no means of his own, shall have such help as the Alderman, Dean, and Bretheren of the gild think right, and such as the means of the gild enable to be given. . . . If any brother die, leaving a daughter true and worthy and of good repute, but undowered, the gild shall find her a dower, either on marriage, or on going into a religious house. . . . While causes are being tried, no one shall speak, except the plaintiff and defendant, and their counsel, and the bailiffs who hold the court, under penalty of eight shillings. . . . Everey burgess worth forty pounds shall keep a horse worth twenty shillings. . . . No one shall grind wheat or other grain in hand-mills, unless through urgent need. The miller must have his share, — the thirteenth part for grain, and the twenty-fourth part for malt. . . . No one, not being a brother . . . shall cut cloths, save stranger-merchants in the course

It is a singular fact that at the very time when capital was becoming more fluid and the degree of communal interest in it actually greater and more clearly demonstrable, the old conception of this interest began to fade from view. To-day it is in the domain of capital that it is most commonly taken for granted that a cleavage must necessarily run through the strata of the community, separating it into "capitalist" and "proletarian" classes, each having no legal interest in the operations of the other. But it is in this field that the interdependency of the community is most evident and the foundation for such a claim is most completely wanting. It is well known that without the bank, business as conducted to-day would hardly be possible, and since the time of Ricardo, who had made a fortune in business at the age of twenty-five, before he began to write on economic and financial subjects, it has been recognized that "the real advantage of a bank

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of trade. Such a one shall have neither Lot nor Cavil with any brother. . . . Any brother of the gild advancing money to a stranger-merchant, and sharing profits thereon, shall be fined forty shillings the first, the second, and the third time; and, if it be done a fourth time, he shall be put out of the gild. And in the same way shall any brother be punished who takes money from a stranger-merchant for such kind of trading. . . . If any one buys goods, misled by false top samples, amends must be made. . . . No butcher, while he follows that calling (*officium*) shall buy wool or hides. . . . Brokers shall be chosen by the commonalty of the town, and shall every year, at Michaelmas, give a cask of wine to the town, and their names shall be registered. . . . No huckster shall buy fish, hay, oats, cheese, butter, or any things sent to the borough for sale, before the stroke of the bell in the bell-tower of Berefrid. . . . Goods shall not be bought up before they reach the market. . . . No married woman shall buy wool; nor shall any burgess have more than one buyer of wool and hides. Whoever unreasonably ingrosses such goods out of the market, shall forefit them to the gild, and pay a fine of eight shillings." . . . The affairs of the borough shall be managed by twenty-four discreet men of the town, chosen thereto, together with the Mayor and four Provosts. Whoever of the twenty-four, having been summoned over-night, fails to come to a meeting, shall pay two shillings. . . . Whoever buys a lot of herrings, shall share them, at cost price, with the neighbours present at the buying. Any one not present, and wanting some, shall pay to the buyer twelve pence for profit. . . . No woman shall buy (at one time) more than a chaldron of oats for making beer to sell. . . . Tanned leathers, brought in by outsiders, must be sold in open market, and on market day. . . . No one shall have more than two pair of millstones. . . . No brother of the gild ought to go shares with another in less than a half quarter of skins, half a dicker of hides, and two stones of wool. . . . Sea-borne goods must be bought 'at the Bray,' and must be carried away between sun-rise and sun-set, under penalty of a cask of wine. . . . No burgess nor out-dwelling brother shall buy or sell in the town any goods belonging to the gild, save on market-day. And no out-dwellers shall buy up victuals coming by ship to the town, under penalty of a cask of wine." . . .

to the community it serves commences only when it employs the capital of others," that "the deposits enable the bank to make advances to men who employ the funds with which they are entrusted in reproductive industry," and that "it is only through reproductive industry that the capital advanced by a banker can really be replaced." [15] The preamble of the statute incorporating the first bank in Massachusetts and one of the earliest in America refers to the proposed institution as a "public utility" beneficial to the trading part of the community.[16] Add to this a consideration of credit which to the merchant "is so delicate and tender, that it must be cared for as the apple of a man's eye." [17] As Ihering has shown, there is the greatest difference in both principle and operation between borrowing by the business man and by the non-business man. The banker who gives credit to an individual (unless he takes security, which is really not an example of credit) takes great risks, but when he gives credit to the business man he in effect gives credit to the ability of such person to serve or to exploit the community as the case may be. The measure in which the merchant enjoys credit is "the criterion of his competence and importance in the mercantile world." With the merchant, as he says:

". . . it is not a question of obtaining the thing for the purpose of satisfying one's own want, but for the purpose of selling it. The respectable merchant may receive credit without losing his standing, and he must do so; he would not be a merchant if he did not utilize it for his operations. The sale of his goods must furnish him the means with which he covers the purchase; he must buy more than he can pay for at once. Credit constitutes an essential and absolutely indispensable factor and lever of his business management;

". . . credit operates with another man's capital. Of the sum X which the dealer on credit stakes on the card, only one-tenth X perhaps be-

[15] Sir John Rahere Paget, Bart., K.C. "Banks and Banking," 3 ENCYC. BRIT., p. 334.

[16] LAWS OF MASS., vol. 1, p. 115 (1780–1788). "An Act to establish a Bank in this State, and to incorporate the Subscribers thereto.

Whereas the establishment of a bank within this State will probably be of great publick utility, and as it will be particularly beneficial to the trading part of the community, and many persons, under the expectation of an Act of incorporation from the Legislature of this Commonwealth, have accordingly subscribed thereto; and whereas William Phillips (etc.) in behalf of such subscribers, have applied for such an Act: Be it enacted (etc.)" Passed Feb. 7, 1784.

[17] MALYNES, LEX MERCATORIA, p. 76.

longs to him, and the other nine tenths to B. If the undertaking succeeds, the whole gain accrues to him; if it fails, then the risk exceeding one-tenth X does not fall on him but on others." [18]

As capital is the subject matter of business, and business itself the function by which the community is served, so labor represents the human energy and skill devoted by the members of the community to the performance of this service. The failure to make this distinction with respect to labor, the failure to note that it involves two things, one mere energy that may also be supplied by a slave or a machine and the other a member of the community whose well-being and integrity involves the very integrity and well-being of the community itself, has been the source of a vast confusion. But space forbids any attempt to elaborate this point, and no elaboration is believed to be necessary. The same citations in both this and the former article which support the doctrine that business is a public institution show that labor no less than capital was treated as a matter of public concern. The ancient rule that "it is the duty of every artificer to exercise his art rightly and truly as he ought" is in fact only modernized in the declaration of Chief Justice Holt, some two hundred years ago, that "if a man takes upon him a publick employment, he is bound to serve the publick as far as the employment extends; and for refusal an action lies, as against a farrier for refusing to shoe a horse." The term "common" laborer in the early law is analogous in every respect to the term "common" carrier. The famous Statute of Labourers did not distinguish between occupations so as to divide the community, as is done to-day, into two classes, wage earners and business men. Every one purporting to deal with the public was a "minister," "workman," "artificer" [19] or "servant," as the case might be.

At common law, then, labor and capital, no less than business, are public. But there is another factor which enters or may enter into business. We refer to land, which is treated for some purposes of economic reasoning not as capital but as something distinguished from capital and in present-day legal and political thought as unquestionably a private possession far removed from all considera-

[18] THE LAW AS A MEANS TO AN END, The Modern Legal Philosophy Series, vol. 5, pp. 133–136, being translation from DER ZWECK IM RECHT.

[19] *Cf. infra*, n. 65, where the *scrivener*, who seems to have combined the functions of scribe, notary, banker and broker, and the schoolmaster, are classed as artificers.

tions of public interest. Some obligation to the community in the conduct of business, it is the present-day fashion condescendingly to admit; but any suggestion that the individual does not have an absolute and uncontrollable right to his land is at once condemned as revolutionary and destructive of "ancient liberties." But if the principles which have been enunciated are sound and if they do in truth represent the spirit and substance of the common law they should apply to land also.

And they do apply to land. Indeed it is to the use and control of land that the principle of public interest has been most persistently asserted and applied. From the earliest times in democratic England as well as in the less favored nations of Asia and Europe, land was uniformly regarded as preëminently subject to considerations of the general welfare and communal interest. A little consideration of the Village Community will make this clear.

This institution is the favored theme in the writings of Sir Henry Maine [20] and has been the subject of learned investigations by Gomme, Seebohm, Fustel de Coulanges and a host of other scholars from every part of Europe,[21] more recently by Professor Vinogradoff.[22] It prevails in India to-day; [23] five-sixths of the population of Russia now lives under it; [24] it has existed over a large portion

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[20] ANCIENT LAW; VILLAGE COMMUNITIES IN THE EAST AND WEST; EARLY LAW AND CUSTOM.

[21] See Bibliography appended to "Village Communities," 28 ENCYC. BRIT., pp. 68, 73.

[22] See generally his VILLAINAGE IN ENGLAND, and ENGLISH SOCIETY IN THE ELEVENTH CENTURY.

[23] ROY, CUSTOMS AND CUSTOMARY LAW IN BRITISH INDIA, being Tagore Law Lectures, 1908 (Calcutta, 1911), pp. 19–20. "The Village Community and the Punchayet are two institutions which were instrumental in producing and preserving many customs. The former is the older of the two and 'is to be found in every part of the world where men have once settled down to an agricultural life.' The Indian village system had its foundation in the communal principle, the essential features of which are that, whilst the individual house-holder may be the supreme head of his own family, he is still bound, as a member of the community, irrespective of his creed or caste, to strictly conform to the village rules and usages regulating the internal economy or administration of the whole community. In the Punjab and the adjoining districts this village system is still found in its primitive vigour. Similarly this system is also prevalent among the Dravidian races in the South and among the Nairs of Malabar and Canara." See also "Village Communities in Western India," ASIATIC QUART. REV. (1868), p. 128, confirming certain views of Sir Henry Maine.

[24] SIR DONALD MACKENZIE WALLACE, RUSSIA, 1 ed., ch. 8, "The Mir or Village Community."

of Europe and Asia,[25] was in evidence in England until the passage of the Inclosure Acts and well into the nineteenth century [26] and was transplanted to America by the first colonizers in the form of the New England town.[27] Much attention has been devoted to showing, and divergent views have been expressed concerning, the origin of this institution and the race or people who devised it, but representing as it does the method universally adopted by men when they take a settled habitation and apply themselves to getting their livelihood from the soil, and being essentially the same wherever it exists, its surpassing interest for the lawyer lies in the fact that next to the family it is the most ancient and characteristic institution of civilized man, and forms an unequalled means of ascertaining what may be called the natural sentiments of mankind when applied to their common interests and what those interests are.

In the typical Village Community we find the families, with their own houses and yards ranged side by side along a roadway more or less in the middle of the territorial area occupied by the community. Land is classified. We see it divided into arable, meadow, marsh, pasture and woodland. There may be several fields of arable, each surrounded by a fence, called common fields — one planted in winter grain, another in spring grain and the other lying fallow. Each field is divided into ribbon-like strips, held in several ownership, often ten times as long as wide, varying in area in England from the oxgang or bovate of fifteen, the virgate of thirty and the hide of one hundred and twenty acres. A given householder may own several strips, but as a rule they do not lie together, but are interspersed among those of his fellows.[28]

The meadow is not occupied in severalty, but strips are allotted

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[25] SCHAEFFER, THE SOCIAL LEGISLATION OF THE PRIMITIVE SEMITES (Yale Univ. Press, Sept. 1915) ch. 11.

[26] Four thousand such Acts were passed between 1689 and 1835. WEBB, ENGLISH LOCAL GOVERNMENT, The Manor and the Borough, pt. 1, 118. See also 6 ENCYC. BRIT., pp. 779, 782, article "Commons."

[27] MAINE, VILLAGE COMMUNITIES, 3 ed., p. 201.

[28] For detailed proceedings of such a community of three or four hundred souls on the Manor of Great Tew in Oxfordshire, comprising 3000 acres, for the years 1692, 1756, 1759 and 1761 (in which last year it changed the planting from a three to a nine-year course), see WEBB, ENGLISH LOCAL GOVERNMENT, The Manor and the Borough, pt. 1, 80, 87. See also VINOGRADOFF, ENGLISH SOCIETY IN THE ELEVENTH CENTURY, pp. 475, 476.

at mowing time. The livestock is herded together, ranging over the waste and the fields not occupied by crops, each inhabitant owning his own stock and being entitled to pasture a definite number of animals in proportion to his holdings of land. The time of planting and harvesting is fixed by regulations binding on all and the same is true of all matters of common interest, including the rotation and character of crops, allotment of meadow, occupation of pasture, putting up and taking down of fences, the construction of mills, roads and other works of common utility. The rules and methods are often intricate, always ingenious. As an observer remarked who witnessed some of the processes of administration still carried on in the eighteenth century, they must indeed "have been great people who thought this out."

The administrative force or official is a council or board of selectmen, a head-man, reeve, *imam*, or similar functionary. In such a community in England and America we find the common driver or herdman, common swine-herd or hog-ringer, common tailor, common smith, common chimney-sweep, common mill, common cowhouse, common lookers, common oven, common helpers, common shepherds, common woodsmen, common boat,[29] town plow or common plow, town granary, town hall, town bull, town horse, town dog, and other domestic animals, the hayward and the fieldsmen.[30]

The significance of such terms as *commune*, *communiter* and *communitas*, so frequently met with in the early records of the English towns and humble Court Baron and Court Leet, thus becomes apparent, and it is small wonder that Sir Martin Wright, at the close of his treatise on Tenures, was led to remark on the frequency of the words *la commune — tote la commune d'Engleterre — le commonaltie — tout le commonaltie — et communaute de la terre — communitas regni — commun de tout le royalme — common assent — common accorde* — etc., in the old statutes and expressed surprise

[29] 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, p. 625, n. 1.

[30] See generally WEBB, *supra*, pp. 47, 79, and compare *infra*, n. 33; also BADEN-POWELL, "A Study of the Dakhan Villages, their Origin and Development," JOURNAL OF THE ROYAL ASIATIC SOCIETY, 1897, p. 239. The staff of artisans remunerated by *haks* or fees levied on cultivated land and residental sites, is said to include assayer, priest, tailor, water-carrier, headman's messenger, gardener, musicians, oil-seller, carpenter, blacksmith, shoemaker or tanner, barber, washerman, potter and astrologer, etc.

at the tenacity and fondness of our ancestors for the word *commune*.[31] But there is no real occasion for surprise. We have only to reflect that the gifts and apportionments of William the Conqueror were fitted into the Village Community system; that the holdings of the lords were often intermixed with those of the villagers and all held by the same title; that it both preceded and survived the "manorial system" and feudalism under which it was submerged but not destroyed,[32] in order to appreciate that these are conceptions which are to be reckoned with to-day despite the difficulty which we have in realizing that the civilization under which we live in addition to its newness is "a rare exception in the history of the world." This observation applies to America no less than to Europe, for as suggested above and shown at some length in the note, the Village Community flourished in the new world as it had in the old.[33] It would

[31] Quoted in 1 MEREWETHER & STEPHENS, HISTORY OF BOROUGHS AND MUNICIPAL CORPORATIONS (London, 1835), p. 442.

[32] See generally VINOGRADOFF, GROWTH OF THE MANOR, pp. 361, 362; MAITLAND, DOMESDAY BOOK AND BEYOND, pp. 519, 520.

[33] In Charlestown, Massachusetts, John Penescot has a dwelling house, yard and garden, and three acres of arable land in the "line feilde"; Robert Cutler, a dwelling house and garden plot and two acres of arable land in the "east feilde," one acre of meadow in the "high feilde meade," "milch cowes comones one and a haulfe," one acre of meadow "in the meade at Wilsones Pointe," 10 acres of wood land in "mistick feilde," and 63 acres in "water feilde"; George Bunker has "one little house with a garden plot" and twenty-one scattered tracts of arable, meadow, marsh and woodland as follows: two of one acre; three of two; four of three; two of four; three of five; two of six; one of seven; two of ten; one of seventy; and one of two hundred seventy acres; also "comones for fiffteene milch cowes". — CHARLESTOWN LAND RECORDS (Record Com.), pp. 10, 28.

Salem had its common meadow, common woodland and common pasture. Both there and in Plymouth "it was long customary in town meeting to assign lots where men should mow for one year or a longer period." In 1636 certain lands were "reserved for the Commons of the towne to serve it for wood and timber." The cattle were driven in the morning to the great Cattle Pen, at the gate of which the town herdsman stood waiting to drive them afield and return them in the evening to each owner either in his private yard or at the common cow houses. There were instances of the town cow, town sheep, town dog and a town horse. Artisans were impressed to help at harvest time. "Village Communities of Cape Ann and Salem," JOHNS HOPKINS UNIVERSITY STUDIES, July and August, 1883.

The Town Records of Boston, Dorchester, Charlestown and Plymouth, and the colonial records of Massachusetts and New York, among others, contain an abundance of further evidence along the same lines. See also Macey's Account of Nantucket, Massachusetts Historical Collections, vol. 3, 1st series, p. 155 (A. D. 1794).

An interesting confirmation of the world-wide range of the village community may be found in the records of controversies arising out of Spanish land grants in New Mexico. See, for example, Bond *v.* Barela's Heirs, 229 U. S. 488, 491 (1913), and the

be difficult in fact to name a single phase of ancestral practice that is not found repeated in one or more of the colonies. A bond of

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further statement of fact below in 16 N. Mex. 660, 666, 120 Pac. 707, 708 (1911); United States *v.* Sandoval, 167 U. S. 278 (1897); Rio Arriba Land & Cattle Co. *v.* United States, 167 U. S. 298 (1897); and United States *v.* Pena, 175 U. S. 500 (1899), in all of which cases, however, the presence and nature of the institutions were apparently unrecognized either by court or counsel. In Bond *v.* Barela, the original giving of possession to the settlers is described by the officer appointed to the task as follows: "I took them by the hand, walked with them over the land; they cried out, pulled up weeds, threw stones, as required by law; and having placed the new settlers in possession of said lands, I gave them the title and vocation they should have in the settlement, which bears the name aforementioned. . . . And the first proceedings having been noted, I proceeded to establish the boundaries as contained in the first petition . . . at which principal boundaries I ordered them to perpetuate their existence with permanent landmarks, pointing out to them, also, as a means of good economy, their common pastures, water and watering places and uses and customs for all, to be the same without dispute, with the condition that each one is to use the same without dispute in equal portions, the richest as well as the poorest; and by virtue of what has been ordered, I pronounce this royal possession as sufficient title for themselves, their children, heirs and successors, to hold their lands now and forever at their will; directing them, as I do direct them, to settle the same within the time prescribed by the royal ordinances: and for their greater quietude, peace, tranquility and harmony, I proceeded to point out the land each family should cultivate, each one receiving in length a sufficient quantity to plant one fanega of corn, two of wheat, garden and house lot, as follows":

In United States *v.* Sandoval, *supra*, pp. 278, 287, the corresponding official reports: "I measured the whole tract of it from north to south and then proceeded to lay off and provide the several portions, with the concurrence of all parties interested, until the matter was placed in order according to the means myself and the parties interested deemed the best adapted to the purpose, in order that all should be satisfied with their possessions, although said land is very much broken on account of the many bends in the river. And after the portions were equally divided in the best manner possible I caused them to draw lots, and each individual drew his portion. . . . a large portion of land (remains) to the south, which is very necessary for the inhabitants of this town who may require more land to cultivate, which shall be done by the consent of the justice of said town who is charged with the care and trust of this matter, giving to each one . . . the amount he may require and can cultivate." . . .

In United States *v.* Pena, *supra*, pp. 500, 504, the alcalde gave the people to understand "that the pastures, forests, waters and watering places are in common."

The following record of the allotment of meadow land in the Town of Plymouth for the year 1633 is of much historical and legal interest. PLYMOUTH COLONY RECORDS, vol. 1, pp. 14, 15. "Orders about mowing of Grasse for the p^{r}nt Yeare, 1633. July 1.

"INPR. It was agreed that M^{r} Will(iam) Collier mow the medow ground lying between y^{e} west side of the brooke at Mortons Hole, & to the ground of Jonathan Brewster.

"2. That Capt(ain) Standish mow the end(es) of the grownd(es) belonging to Edward Bumpasse & Will(iam) Latham, insteed of that M^{r} Collier hath, & he formerly mowed.

kinship unites the Babylonian *ugaru*, the Hebrew *migrash*, and the Russian *Mir*, with Boston Common.[34]

As might be expected, the underlying significance of the principles and ideas which have been set forth has been variously interpreted. Maine would see in them a reflection of notions of family interdependency, collective ownership and subjection to a patriarchal power;[35] Pollock and Maitland, individualism *in excelsis*,[36] and Vinogradoff "communalism" and "equality."[37] But however

"It. That Franc(es) Sprague mow at the Eagle, & about his owne ground where he mowed last yeare.

"It. That Will(iam) Basset mow at the end(es) of his owne ground.

"It. The watering place & thereabout for M^{r} Fogg & M^{r} Weston, M^{r} Combs, together wth that M^{r} Weston, Joh(n) Fans had last yeare.

"It. For Goodman Cutberd at Wellingly, & y^{t} he mowed the last yeare.

"It. For Joseph Rogers that w^{ch} he mowed last yeare.

"It. To Joh(n) Wynslow, Allerton, M^{r} Fuller, Wid^{o} Wright, & Joh(n) Adams that w^{ch} M^{r} Gilson mowed last yeare, & the rest adjoyning unmowed.

"It. To Lieutenant Holmes that w^{ch} is against his ground.

"It. To Stephen Tracy wthin his owne ground.

"It. To Manasseh Kempton that at the Iland Creeke abutting upon Stephen Tracies ground & Edmund Chandlers.

"It. To Tho. Prence that w^{ch} was mowed last yeare for M^{r} Hatherly & Manasseh Kempton, at Jones River.

"It. To M^{r} Smith y^{t} he mowed last yeare.

"It. To M^{r} Williams y^{t} w^{ch} Fr. Eaton cutt last yeare, except y^{t} at the upp^{r} path, wth some by him at home.

"It. To Christopher Wadsworth & Will(iam) Wright where they mowed last yeare, & at the upp^{r} path where Franc(es) Eaton mowed last yeare.

"It. For the stock of cattle belonging to the pore, where they cutt last yeare.

"It. For Edw. Wynslow that against his own ground, & from the marsh over against Slowly House up the river.

"It. That M^{rs} Warren & Rob^{t} Bartlet mow where they did last yeare, & the marsh adjoyning, as high as Slowly Howse.

"It. That George Sowle mow for a cow neere his dwelling howse.

"It. That M^{r} Hopkins & Tho. Clarke . . . . where they mowed last yeare, except George Sowles cow, as before appointed."

[34] SCHAEFFER, *supra*, ch. 11. The *fallahin* or peasants of modern Palestine are said to hold their pasture lands and threshing floors in common.

[35] MAINE, EARLY HISTORY OF INSTITUTIONS (London, 1875), p. 2. "There is also fresh evidence that the more backward of the outlying Slavonic societies are constituted upon essentially the same model (village community); and it is one of the facts with which the Western world will some day assuredly have to reckon, that the political ideas of so large a portion of the human race, and its ideas of property also, are inextricably bound up with the notions of family interdependency, of collective ownership, and of natural subjection to a patriarchal power."

[36] 1 HISTORY OF ENGLISH LAW, p. 623.

[37] VILLAINAGE IN ENGLAND, pp. 237, 238: . . . "Even when the shifting, 'ideal' share in the land of the community had given way to the permanent ownership by

this may be, it seems at least to be evident that wherever men have collected in communities under conditions of equality under the law (a condition formerly more or less restricted but now in theory at least almost universal), they have insisted on freedom of economic opportunities, have found that the greatest liberty of all was obtained by the management and enjoyment collectively of a considerable portion of property and have placed emphasis on "use" and not on "possession." This attitude has not been found inconsistent with differences in wealth, or with the enjoyment by each of the result of his own efforts, but on the contrary has been considered the means by which such enjoyment might be best effectuated.[38] Nor has society been reduced thereby to a dead level; there have always been "all sorts and conditions of men." The history of the Village Communities proves conclusively that almost as soon as communities are formed, the principle is recognized that the land is charged with obligations for the benefit of the whole, just as when a man enters trade he is to carry on that trade under the ancient law of England with due regard to the general welfare. A comparison of the early history of Village Communities and the early history of the trading towns in England shows that the same principles of law and theories of public interest governed both.

It is clear, therefore, that trade, labor, capital and even land have been treated as matters of common, that is, public, interest over a large portion of the globe, that land indeed is still so treated by a large portion of mankind, and that the ideas reflected in this treatment were early embodied in the common law. But in order to show that these facts have a present interest, it is necessary to go further.

Within the memory of men now living novel ways and means of

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each member of certain particular scattered strips, this permanent ownership did by no means amount to private property in the Roman or in the modern sense. The communal principle with its equalising tendency remained still as the efficient force regulating the whole, and strong enough to subject even the lord and the freeholders to its customary influence. By saying this I do not mean to maintain, of course, that private property was not existent, that it was not breaking through the communal system, and acting as a dissolvent of it. I shall have to show by-and-by in what ways this process was effected. But the fact remains, that the system which prevailed upon the whole during the middle ages appears directly connected in its most important features with ideas of communal ownership and equalised individual rights." . . .

[38] Compare KORKUNOV, GENERAL THEORY OF LAW, Modern Legal Philosophy Series, vol. 4, pp. 251–253.

communal existence have sprung up, and conceptions such as have been described are to-day remote from our thoughts. The principles of conduct which naturally follow from their recognition are disregarded in fact no less than in theory, and we live under conditions that appear to have no resemblance to or connection with those that have gone before.[39] We are not however without our censors and apologists, and many explanations of the changes in conditions and in legal interpretation and theory have been advanced.

The explanations of the changes in conditions are only less numerous than the solutions that are suggested for the problems to which they give rise, and vary from capitalism, division of labor and invention of machinery to abuses on the part of those in power. Capital, however, appears both as a cause and a consequence as the radius of business operations extends beyond the possibilities of simple barter, and represents the savings of the community available for reproduction. Machinery stands in the same double relation, and it is quite impossible to say whether the economic and social changes have led to the invention and installation of mechanical devices or whether the converse is the truth. We find division of labor in all ages and under all conditions of existence, in the Village Community, the medieval city and the trading town no less than in our modern civilization. From Plato downward the beneficence of division of labor has been extolled and since Darwin's time economists and sociologists have dwelt with fondness on the biological analogies.[40]

The changes in the law have also been variously explained. It is said with much ingenuousness "that our ancestors when they came into this new world claimed the common law as their birthright and brought it with them except such parts as were judged inapplicable to their new state and condition." [41] Another favorite explana-

[39] For an analysis of these conditions as seen by a foreign jurist, see PIC, TRAITÉ ÉLÉMENTAIRE DE LEGISLATION INDUSTRIELLE (4 ed., 1912), p. 14.

[40] As *e. g.* by Marshall, *supra*, p. 241.

[41] Commonwealth *v.* Knowlton, 2 Mass. 530, 534 (1807). See also Carew *v.* Rutherford, 106 Mass. 1, 14, 15 (1870).

Cf. COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 870–890, and the guarded discussion of the police power. Dealing with the regulation of prices, the learned author says: "The price of wages was oftener regulated than that of anything else, the local magistrates being generally allowed to exercise authority over the subject. The practice was followed in this country, and prevailed to some extent up to the time of

tion has to do with the adoption of American constitutions. But we have shown in the previous study how and why the old common-law idea of business was lost sight of, and that need not be repeated here. In this connection the difficulties were shown into which the laws of business have been brought through the attempt to use the old laws after this idea had fallen into desuetude. How lately the common-law theories were held and how easily the current might have been kept in its old channel by a firm adherence to first principles, is evidenced by the cases in the note.[42] The

independence. Since then it has been commonly supposed that a general power in the State to regulate prices was inconsistent with constitutional liberty." This statement is often cited as authority for the proposition that the adoption of the American constitutions worked a transformation in the laws. But the statement is not authority for that proposition and the idea itself is an illusion. The fact is that one of the most drastic laws of this kind ever enacted was passed by New York after the Declaration of Independence on the recommendation of the Continental Congress to all the States. See *e. g.* LAWS OF NEW YORK, ch. 43 (1780), entitled "An Act for a General Limitation of Prices, and to Prevent Engrossing and Withholding in this State." Other States possessed similar acts.

[42] Boston and Roxbury Mill Corporation *v.* Newman, 12 Pick. (Mass.) 467, 477 (1832). Putnam, J.: . . . "But it is said that the analogy (turnpikes) fails, when applied to laying bare the flats, in order to get the water power for mills, because the public have no right in respect to the manufactories, as they have to travel upon the turnpike roads. But the public may be well said to be paid or compensated in the one, as well as in the other case; and are benefited by the one improvement as well as the other. Take the grist-mill established in this city, as an example. Is it of no benefit to have the corn ground near to the inhabitants, rather than at a distance? 'But you cannot compel the miller to grind your corn for the toll, as you may the proprietors of the turnpike to let you travel over the road for a toll.' If there be not an actual, there is a moral necessity imposed upon the owner of the mill, to accommodate the public to the extent of his power. Who ever heard of a refusal? And in regard to the manufacturing establishments, is it nothing to the public that great numbers of citizens have the means of employment brought to their homes? And are not the proprietors obliged to give employment? They cannot carry their works on without labor, and who that is disposed to industry and that kind of employment, is prevented from its exercise? This becomes a matter of interest which will certainly direct and govern the parties. And it is among the most pleasant considerations attending this branch of the subject, that the interest or benefit arising from manufacturing establishments is distributed quite as much, and oftentimes more, among the laborers and operatives, than among the proprietors of the works."

Columbus Mills *v.* Williams, 11 Ired. (N. C.) 558, 561 (1850): Pearson, J.: . . . "Political and other collateral considerations are apt to connect themselves with the subject of corporations, and thereby give to it more importance than it deserves as a *dry question of law;* and the unusual amount of labor and learning, bestowed on it, has tended to mystify rather than elucidate the subject. Divested of this mystery, and measured in its naked proportions, a corporation is an artificial body, possessing such powers, and having such capacities, as may be given to it by its maker. The purpose in making all corporations, is the accomplishment of some *public good.*

same causes, however, operated in the cases of labor, capital, and land as in the case of business and the same results have been produced.

For relief from the harsh phases of modern and especially industrial life, some yearn for a return to former conditions,[43] while others would reconstruct society after plans of their own. In the search for guiding principles Berolzheimer and other civilians would invoke the aid of legal and economic philosophy. But the English and American lawyer will neither forget nor disregard the lessons of experience and will turn with renewed eagerness to the long record of the common law. The old conditions have passed away, never to return, and the changes that have occurred were in the main natural and inevitable and due to the growth of acquaintance and intercourse by and among peoples, the spread of knowledge, the decay of tribal and racial prejudices, the expansion of ideas and the increase in desires and the demand for the means of satisfying them.[44] The Village Community was bound to pass away, as today it is in the process of breaking up in Russia despite the belief of Russian scholars that in the *Mir* they have the key to the mitigation of the proletarianism that is said to menace the western world.[45] The Inclosure Acts, whatever individual motives may

Hence, the division into public and private has a tendency to confuse and lead to error in the investigation; for, unless the public are to be benefited, it is no more lawful to confer 'exclusive rights and privileges' upon an artificial body, than upon a private citizen."

Hazen *v.* Essex Company, 12 Cush. (Mass.) 475, 477 (1853). Shaw, C. J.: . . . "The establishment of a great mill-power for manufacturing purposes, as an object of great public interest, especially since manufacturing has come to be one of the great public industrial pursuits of the commonwealth, seems to have been regarded by the legislature and sanctioned by the jurisprudence of the commonwealth, and, in our judgment, rightly so, in determining what is a public use, justifying the exercise of the right of eminent domain. See St. 1825, c. 148, incorporating the Salem Mill-Dam Corporation; Boston and Roxbury Mill-Dam Corporation *v.* Newman, 12 Pick. 467. The Acts since passed, and the cases since decided on this ground, have been very numerous.". . .

[43] *Cf.* THOROLD ROGERS, SIX CENTURIES OF WORK AND WAGES, ch. 15.

[44] *Cf.* CUNNINGHAM, GROWTH OF ENGLISH INDUSTRY AND COMMERCE, Early and Middle Ages, p. 533. . . . "Both in rural and in industrial areas the household was ceasing (18th century) to be the unit of organization, and market considerations were becoming paramount; in towns the change is marked by decay of gilds; in rural districts by the extinction of villainage." See also VINOGRADOFF, VILLAINAGE IN ENGLAND, pp. 180, 181.

[45] See WALLACE, RUSSIA, pp. 107, 587; HECKER, RUSSIAN SOCIOLOGY, Columbia University Studies, vol. 67, no. 1 (Nov. 1915).

have been, were necessitated by economic considerations [46] and the small industries represented by the gildsmen, where every man if not the master of was at least closely identified with a complete economic cycle and in physical control of the complete turnover of his investment, were certain to succumb. The irresistible character of the forces at work is evident from the fact that they are still active. We need only refer to the swelling urban populations, the Trust, the department and chain store, the mail-order establishment, and the operation and effect of modern advertising. But although conditions have changed, and doubtless will continue to change, the principles of law controlling as between man and man have not changed and are to be found to-day the same as in past ages, in the common law.

At common law the relations of capital, labor and business are public in every detail and not alone in respect to "the public safety, the public health and the public morals." The problem presented has to do with the relations of the community to those of its members who work, and of those workers to the community which they serve. It is not confined to the manufacturing industries as De Tocqueville seems to have assumed,[47] but is associated with *business*, and finds illustration in the bank and the department store, with their complements of clerks, no less than in the factory and the mine with their swarms of wage earners and the railroad with its thousands of employees. All of these are engaged in a public occupation at common law, but because the courts have looked upon business as private, and have otherwise approached the subject from a singularly narrow point of view, little progress has been made in the solution of the legal problem to which the phenomena give rise.

It is idle, therefore, in the face of these facts, to speak of "*my* business" and "*his* business" in the literal sense in which those words are employed in the cases where they occur. The notion is

[46] See 6 ENCYC. BRIT., pp. 779, 782, article "Commons."

[47] See 2 DEMOCRACY IN AMERICA, ch. 20, entitled "How an Aristocracy may be created by Manufactures," and in which he shows that the natural tendency of the manufacturing system is to produce a condition of society in many respects more severe than any that has preceded it. "The friends of democracy," he says, in conclusion, "should keep their eyes anxiously fixed in this direction; for if ever a permanent inequality of conditions and aristocracy again penetrate into the world, it may be predicted that this is the gate by which it will enter."

foreign to the conceptions of the period covered by the Village Community and the craft and merchant gilds. It is out of harmony with the common-law theory of business and contradicted by the actual facts of present-day business life. When a man undertakes a community service — a business (as at the present time he may freely do, unless he requires the assistance of the rest of the community by eminent domain or other grant of special privilege) — he thereby limits the freedom of the remainder of the community by occupying to that extent the field of service which was before left open, excluding others therefrom, and dominating a position which might perhaps be "better supplied when he had made it empty." That he is bound to exercise his calling "rightly and truly as he ought" and "to serve the publick as far as the employment extends," are maxims of the common law made necessary by the fact that the community is entitled to its *quid pro quo*.[48] When the men of Plymouth were aggrieved by the ill grinding of their corn by a child "that has no descresion" and sent a committee to inform Captain Church that they would "not allow of that lad to be ye Towns miller," and that if he expected to hold the privilege of the stream he should carefully observe the conditions or "ye Town will take some other method to have their work done";[49] when they complained of the decay and disrepair of the grist mill and voted that "if the owners of sd mill will make sutable provision that ye sd mill may be repaired by ye next Town Meeting or in some way that ye Work may be Done in some short Time but if Delayed and noe Effectual Care be taken by that Time Then the Town will give liberty to some person or persons to sett up a mill to Doe ye Town Work";[50] when the town of Boston granted liberty to set up a pump and to repair the well and ordered "that in case any of the neighbours refuse to contribute to the charge of the sayd pump and well, itt shall bee in the power of those that have disbursed monyes for the same, to deny any others fetching water att the pump";[51] when the men of Boston granted liberty to erect a mill and provided that the "Towne will not allow any other common mill to be erected except the necessary occasion of the Towne shall require

[48] *Cf.* Fairfax Y. B. 8 Ed. IV. 18, pl. 30.

[49] Records of Town of Plymouth, vol. 2, 192 (A.D. 1719).

[50] *Ibid.*, 198.

[51] Boston Town Records (Rec. Com.) 141 (A.D. 1657).

it"; [52] when they granted permission to Captain Breedon and his associates to erect a wharf and highway and to enjoy the profits for twenty-one years provided that "it shall bee in the liberty of any inhabitant to come in as a partner in the same worke within six monthes after finishing the said worke, they paying their equall proportion of charge"; [53] when the humble Lord's Court of Manchester as late as the nineteenth century presented and fined mill owners for letting their cotton factories get into dirty condition [54] — in all these cases we find the sense of communal right and obligation illustrated and the right itself enforced. That the members of the community have no interest in how profits from community services shall be divided, no right to participate in the rendering of that service, no control of the time, manner and conditions under which that service shall be performed, are seen to be at best modern ideas.[55] And when we take into consideration the special legislation

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[52] *Ibid.*, 74 (A.D. 1643).

[53] *Ibid.*, 156 (A.D. 1660).

[54] WEBB, ENGLISH LOCAL GOVERNMENT, *supra*, p. 110.

[55] When the handicaps under which they labored are taken into account, the ingenuity and effectiveness with which early communities dealt with their special economic problems seem to compare very favorably with that shown in modern times. See *e. g.* the "Rotation," *i. e.* order of grinding, in "Brehon" Laws —*Feineachas* — (fifth century) 4 ANCIENT LAWS OF IRELAND, pp. 217, 219. . . . "Eighteen days complete are in the rotation at the mill. Monday *is due* to the well, Tuesday to the pond, Wednesday and Thursday to the artisans, Friday and Saturday to attendance. The next Monday *is due* to the pond, Tuesday from the well to the pond, Wednesday and Thursday to the artisans, Friday and Saturday to attendance. Monday *is due* to the pond, Tuesday from the pond downwards, Wednesday and Thursday to the artisans, Friday and Saturday to attendance. This is when it is rotation. But when it is *a case of* price, it is ten 'screpalls' *that are charged* on the well, and ten *on the land* from the well to the pond, and thirty 'screpalls' on the pond, and ten on the *land*-pond downwards, all which amount to sixty 'screpalls' if it be arable land; if it be not arable land it is one-half of this, *i. e.* five 'screpalls' on the well, and five from the well to the pond, and fifteen on the pond, and five from the pond downwards, all which amount to thirty 'screpalls.' What is the reason that it is equal amount that is upon the lands when it is a rotation, excepting the pond, and that it is not equal amount when it is price (*i. e. money that is paid*)? The reason is, the men of the lands got their choice whether they would have rotation, or pay price, and the choice they took was rotation: one-third goes to the land and the things which belong to it, and one-third to the science of the artisans, and one-third to food and to rude labour, *i. e.* a sixth to each.

Monday to the well, a pleasant deed,
Tuesday following to the pond,
Wednesday, Thursday, prosperous assignment,
Are given to the artisans;

with which modern communities surround business, the protective tariffs, the corporation laws with their guaranties of individual immunity from the consequences of failure or mismanagement, the bankruptcy laws and receiverships by which the community wipes off at a stroke the results of particular business adversities and absorbs the loss by distributing it over the whole range of industry, the inappositeness of such expressions as "*his* business," "*his* capital," "interference with *his* business" becomes all the more apparent. "Capitalist" and "capitalism" also are but vague or figurative expressions, conveying no definite idea and capable of as many connotations as there are persons to employ them.

The fact is that labor bears the same relation to business that capital does, but at the present time the workers are nowhere recognized in the cases as having a definite legal relation to and legal right in the business process. They are subject to dismissal with or without cause, have no voice in the management, no right to promotion, no right "to see the books," no right in fact but that of taking or refusing the wage that is tendered them.[56] In theory at

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Friday and Saturday, fine the arrangement,
Are assigned to the attendance,
This is the peaceable ordering,
The proper distribution of the first week.
Monday and Tuesday, sweet remembrance,
To the lands as far as the pond,
And from the pond out,
A different one does not occur.
Wednesday, Thursday, of wonderful work,
In this week *go* to attendance;
Friday and Saturday, of mention least,
To the artisans who superintend."

See also MAITLAND, DOMESDAY BOOK AND BEYOND, p. 144. . . . "Sometimes the ownership of a mill is divided into so many shares that we are tempted to think that this mill has been erected at the cost of the vill. In Suffolk a free man holds a little *manerium* which is composed of 24 acres of land, 1½ acres of meadow and 'a fourth part of the mill in every third year': He takes his turn with his neighbours in the enjoyment of the revenue of the mill. We may even be led to suspect that the parish churches have sometimes been treated as belonging to the men of the vill who have subscribed to erect or to endow them. In Suffolk a twelfth part of a church belongs to a petty *manerium* which contains 30 acres and is cultivated by two bordiers with a single team. When a parish church gets its virgate by 'the charity of the neighbours,' when nine free men give it twenty acres for the good of their souls, we may see in this some trace of communal action."

[56] Adair *v.* United States, 208 U. S. 161, 174 (1908). "While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common

least, labor everywhere, no matter how the question is presented, is considered only as a matter of contract.

To-day it is chiefly under the head of labor difficulties — strikes, lockouts and boycotts — or under the head of the constitutionality of legislation designed to deal with the problems of Labor and Capital that we meet with the topic in the reports if we except the subject of business in its more external aspects — combinations "in restraint of trade," monopolies, etc. — which has occupied such a large portion of the attention of American courts during the last quarter of a century.

At the outset a marked lack of discrimination in the use and choice of materials which already lie at hand and the application of rules whose meaning is supposed to be understood, is to be noted. Cases like *Bohn Manufacturing Co.* v. *Hollis*[57] and *Mogul S. S. Co.* v. *McGregor*,[58] which have to do with the combination of businesses or the relations of businesses to each other, are not distinguished from cases like *Pickett* v. *Walsh*,[59] *Temperton* v. *Russell*[60] and *Lawlor* v. *Loewe*,[61] which have to do with the relations of the workers to business, or cases like *Gregory* v. *The Duke of Brunswick*,[62] which has nothing at all to do with business. Lately a new term, "competition," has been pressed into service without legal definition, only to make confusion worse confounded. The ancient legal term *damnum absque injuria* is being employed in novel senses.[63] That

good and the general welfare may require, it is not within the functions of government — at least in the absence of contract between the parties — to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé."

[57] 54 Minn. 223, 55 N. W. 1119 (1893).

[58] 21 Q. B. D. 544 (1888), 23 Q. B. D. 598 (1889).

[59] 192 Mass. 572 (1906).

[60] [1893] 1 Q. B. 715.

[61] 209 Fed. 721 (1913); *affirmed* 235 U. S. 522 (1915).

[62] 13 L. J. C. C. P. 34 (1843).

[63] *Damnum absque injuria* is a technical *phrase*, and properly used, implies either a conflict and compromise between equal rights, or right on one side and rightlessness on the other. Inasmuch as the courts look upon business as a purely private matter and regard a strike as an interference with it, it is evident that consistency and frankness require not the application of the principle of *damnum absque injuria*, but the statement that "This is legal damage, but we will deny relief."

what is lawful when done by one can be unlawful when done by many is discussed on the assumption that the individual may be a match for one, but helpless against several, overlooking the fact that the converse may also be true, and the further fact that much may depend on the rules and regulations by which the matching is controlled.[64]

There are evidences, however, of changing views and a gradual recognition of the fact that, if the economic, social and legal premises which underlie the decisions are sound, many of the decisions which justify strikes under certain conditions are unsound and that those which prohibit them absolutely can at least lay a greater claim to consistency. Law never considers power among those who are *sui juris*. It is a question of right and wrong, the antithesis of force, and only comes into existence when brute strength and power are made to submit to the peaceful and persuasive voice of reason. *Damnum absque injuria* has to do with that which has a direct relation to the advance of one's own or the public's legal right and interest and the principle cannot be invoked to justify interference with the right and interest of another party. "A man can damage me and not do an unlawful act (*injury*), as if the sheriff arrests me, this is damage because he restrains me of my liberty, but this is not unlawful. So if an artificer gets more customers than another of the same art — as a money broker or a schoolmaster who has more pupils than another, because he is more learned — this is damage to the other but not unlawful because every one ought to prefer himself. . . ." [65]

A strike cannot be justified on the ground of *damnum absque*

[64] *Cf.* Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418, 439 (1911); also the reasoning of Bowen, L. J., and Lord Esher, M. R. in Mogul S. S. Co. *v.* McGregor.

[65] Y. B. 12 HEN. VIII, 3 pl. 3: Brook, J.: "et ho(mm)e poit fair(e) dam(mage) a moy, et ne fair(e) injury; come si le Vic(ont) m(e) arreste, c(eo) est dam(mage), p(ur) c(eo) q(ue) il me restrain(e) de ma libertie, mes c(eo) n'est injury. Issint si un artificier acquir(e) a luy plusieurs customers que autr(e) de mesme l'art; come Scrivener, ou Schoolmaster qui ad plusieurs disciples que aut(re), p(ur) c(eo) q(ue) il e(st) plu(s) erudite, c(eo) e(st) dam(mage) a l'aut(re), m(e)s nemy injury, p(ur) ceo que chescu(n) doit preferr(e) luy m(esme), et n'e(st) punissable. Come si l(e) S(eig)n(eu)r bate s (on) villein, ou l(e) bar(on) sa fe(mm)e, ou on bate un ho(mm)e utlage ou traitr(e), ou pagan, ils n'auront acc(ion), p(ur) ceo que ils ne sont p(as) abl(e) de suir action: mes icy il ad pris non chie(n) et coment que soit chose de plaisir, uncore j'ay propriete en ceo."

For other examples see 1 ROLL ABR. 107 pl. 11, 12, 13, 15; Y. B. 11 HEN. IV, 47 pl. 21; Y. B. 22 HEN. VI, 14 pl. 23; *cf.* Y. B. 7 ED. III, 50 pl. 25.

injuria or as lawful "competition" without at the same time admitting an interest of the strikers in and to the business. A general social interest is not enough, for a right based on such an interest can never exceed the bounds of peaceful persuasion.

A strike is not merely a simultaneous quitting of work in the exercise of one's own right not to work. The object of a strike is to exert such a compulsion as will compel surrender. A leading Massachusetts case [66] frankly states the matter as follows:

"Speaking generally a strike to be successful means not only coercion and compulsion which, for practical purposes, are irresistible. A successful strike by laborers means, in many if not in most cases, that for practical purposes the strikers have such a control of the labor which the employer must have that he has to yield to their demands. . . .

"The effect of this (the action of the strikers) in the case at bar appears to be that the contractors are forced against their will to give the work of pointing to the masons and bricklayers. But the fact that the contractors are forced to do what they do not want to do is not decisive of the legality of the labor union's acts. That is true wherever a strike is successful. . . .

"Further, the effect of complying with the labor union's demands apparently will be the destruction of the plaintiffs' business. But the fact that the business of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of the acts. . . . ."

This doctrine naturally required limitations if the semblance of law was to be preserved and the court effected the compromise by limiting the "right" to the particular employer with whom the dispute existed,[67] thus greatly weakening, if not neutralizing, the decision's seeming measure of altruism. But, as intimated, this inconsistent and unsatisfactory handling of labor controversies by the courts is coming to be recognized by the courts themselves. In

[66] Pickett *v.* Walsh, 192 Mass. 572, 581, 584 (1906).

[67] Pickett *v.* Walsh, *supra*, pp. 587, 588: . . . "In our opinion organized labor's right of coercion and compulsion is limited to strikes against persons with whom the organization has a trade dispute; or to put it in another way, we are of opinion that a strike against A, with whom the strikers have no trade dispute, to compel A to force B to yield to the strikers' demands, is an unjustifiable interference with the right of A to pursue his calling as he thinks best. . . . It is settled in this Commonwealth by a long line of cases that a defendant is liable for an intentional and an unjustifiable interference with the pursuit on the part of the plaintiff of his calling, whether it be of labor or business." . . .

a late federal case dealing with a threatened boycott, Judge Hough, while stating that it was useless to parade the decisions bearing on such controversies, because reconciliation was impossible, went on to say:

" . . . In the United States Courts for this circuit, *National Fireproofing Co.* v. *Mason Builders' Ass'n*, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148, is controlling. It accepts the New York cases fully, piously regrets the injuries committed, and writes the epitaph of litigation such as this by declaring that, when equal rights clash, equity is helpless. This is true; it would have been just as true to point out that the result of legalizing strikes, lockouts, and boycotts under any circumstances must be that those who understand the use of such legal tools can always keep within the law and accomplish their main purpose while inflicting all necessary 'incidental' injury." [68]

The Coppage case [69] recently decided by the Supreme Court illustrates perfectly the present legal conception of labor, and of its relation to capital and to business, and it would be difficult to find a case showing greater confusion in the law or one showing more clearly that this confusion is due solely to the inability to recognize the public nature of labor and capital. The question presented was whether an employer could require or "coerce" an employee as a condition of securing or continuing in employment to enter into an agreement not to become or remain a member of a labor union. The Supreme Court had already held in the Adair case [70] that the employer could *discharge* an employee for that reason or for no reason, and unless the cases were distinguishable or the Adair case was to be overruled there was no occasion for extended discussion. The Kansas court in sustaining the statute involved had distinguished the Adair case, but there was a vigorous dissent by one of the Justices, who said that:

"The law obviously was not passed because any person seriously believed its enforcement would result in real benefit to the laboring men or to labor unions. It is like the old soldier's preference law, and similar enactments, 'that keep the word of promise to our ear and break it to our hope.' After reading the majority opinion, members of labor unions may rest for a time under the delusion that the legislature, in the exercise

[68] Gill Engraving Co. *v.* Doerr, 214 Fed. 111, 121 (D. C., S. D., N. Y., 1914).
[69] Coppage *v.* Kansas, 236 U. S. 1 (Jan. 1915).
[70] 208 U. S. 161 (1908).

of the police power, has reached out its strong arm to shield the laboring man from the attempts of his employer to deprive him of the right to become and continue a member of a labor union, and that the construction placed upon the act by the court has made the legislation effective to accomplish the purpose, but a perusal of former decisions of this court will cause the delusion to disappear." [71]

The statute was declared unconstitutional by the Supreme Court in a majority opinion in which the Adair case was followed and reaffirmed, but two Justices, who may be designated as the minority Justices, and a single Justice filed separate dissents arguing in favor of the constitutionality of the law. The minority argued that the Adair case was distinguishable — that here the legislature had simply made a certain kind of condition in a contract illegal — a type of legislation of which there were many examples and from which this case was not so dissimilar as to require the statute to be held unconstitutional; but no effort was made to make any practical distinction between the two cases. The single Justice, who had dissented in the Adair case, dissented in this one, and for the reason that:

"In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. . . . If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by a law in order to establish the equality of position between the parties in which liberty of contract begins." [72]

But the majority and the minority Justices, like the Judges in the court below, were evidently unwilling to rest their decision on technical grounds and the discussion took a wide range in which the rights of an employee to join a union, the rights of employers to organize, the comparative rights of employer and employee as contracting parties and the inequality of the position, the public interest in trade unions and the menace to the personal rights of laborers were adverted to, but no issues were joined under any of these heads. All of the Justices assume that they are dealing with a contractual relation. To the majority this statute has no conceivable relation to the police power, and so "interference" with the employer's rights is without precedent and unwarranted. The minority hold that the statute does not interfere with the liberty of

[71] 87 Kan. 752, 760 (1912).

[72] 236 U. S. 1, 26–7 (1915).

contract any more than some other statutes which have either been held or would undoubtedly be held good.

The decision is important. As the minority observed, it not only invalidates the legislation of Kansas but necessarily decrees the same fate to like legislation of other states of the Union, comprising altogether nearly half the population of the United States. But its importance does not lie so much in its immediate as in its remote effects, and in the things which are left to be decided rather than in those which are decided. The underlying difficulty lies in the opposite conceptions of public interest, and the same is true of *Pickett* v. *Walsh* and most of the other labor cases. In *Pickett* v. *Walsh* the court looks at capital as the private interest of a few individuals and at labor as the private interest of a few other individuals, which interests conflict or compete, whereas in fact, and at common law, labor and capital cannot compete or conflict. So in the Coppage case the difficulties the Justices meet are due to their failure to distinguish between the rights of an individual who hires men and of an individual who is hired as contrasted with the communal right with respect to the capital and the labor. The essential question is not whether a laborer has a right to join an organization or a business man to hire on any terms he chooses, but it is whether the community has any interest in the labor and capital applied to business. The fact is that the members of the community, who perform its business functions, are but as "links in a long chain" into which the very spirit of progress fashions them. If one link has no claim against the other links, no interest in their integrity, no right to insist that each perform its function "as it ought," the whole basis for the association ceases to exist and the association itself becomes farcical and absurd.

To-day the situation of the dispensable members of businesses is in these respects, as we have seen, one of rightlessness under the law, and often it is claimed of economic subjection, resembling in this respect the condition of the serfs of the middle ages "who did not know in the evening what they were to do the next day."[73] The serf as known in England had many rights, he was not a slave,[74]

[73] BRACTON, DE LEGIBUS ANGLIAE (Ed. London, 1640), p. 26: "Est enim purum villenagiu(m), à quo praestatur servitiu(m) incertum & indet(er)minatu(m), ubi sciri non poterit vesperè, quale servitium fieri debet manè, vz. ubi quis facere tenetur, quicquid ei praeceptum fuit."

[74] Compare POLLOCK AND MAITLAND, 1 HISTORY OF ENGLISH LAW, p. 429. VINOGRADOFF, VILLAINAGE IN ENGLAND, pp. 43 *et seq.*, 152.

but so far as his means of livelihood were concerned he might have been better off if he had been a slave, for then it would have been necessary for his lord and master to supply him with the means of sustenance.

From this review it will be seen how far the solution of the problems of labor and capital lies from "doing something" for labor or from schemes of profit sharing dictated by selfish or even humanitarian motives. It is not a matter of coddling, mollifying, or favoring any particular person or group of persons, but is solely concerned with discovering, recognizing, and respecting the rights of the members of the community, each in his degree. So long as any problem of labor or capital or business is treated in law merely as a problem between individuals, the common law cannot be enforced and the real evils which produce those problems cannot be remedied except by legislation.

It will also be seen how large a measure of correct principle is reflected in the legislation of the time — minimum wage and factory laws, workmen's compensation acts and forms of social insurance — so large in fact as to suggest to enlightened "Capitalism" and Trade Unionism that much of the time and energy spent in testing the constitutionality of these laws in the courts might better be expended in legislative committee in the endeavor to perfect them. It remains for those charged with the interpretation of the law to respond in equal degree to the demands of modern conditions, and the pity is that they have not done so. To believe that the common law is not adequate for every need is to fail to grasp the history of the common law and to understand what the common law is. It was by the steady and peaceful process of enlightened decision that the English judges swept away the condition of villainage which society had outgrown and accomplished by the processes of law what was only achieved by a revolution in France and signalized by "a flourish of trumpets" in the emancipating decree of 1789.[75] The common law is a living, a growing and an adaptable

[75] VINOGRADOFF, "Villenage," 28 ENCYC. BRIT., pp. 81, 84: . . . "It is a fact of first-rate magnitude that in the 15th century customary relations on one hand, the power of government on the other, ripened, as it were, to that extent that the judges of the king began to take cognizance of the relations of the peasants to their lords. The first cases which occur in this sense are still treated not as a matter of common law, but as a manifestation of equity. As doubtful questions of trust, of worship, of testamentary succession, they were taken up not in the strict course of justice, but as

system, not something completed and stored away in a by-gone age from which our immediate ancestors selected the choice portions for our guidance, and the earlier definitions of it by the lawyers and masters are also the best: "And Sir, the law is founded on reason, and that which is reason is law." [76] "Custom which runs through the whole land is the common law," [77] and "what thing is custom of the land but the law of the land." [78] "Reason is the life of the law; nay the common law itselfe is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man's naturall reason." [79] Blackstone's statement that "the common law is the perfection of reason" can thus be accepted without reservation in the sense that the perfection of reason is the common law. To say that reason is the common law and that custom is the common law is indeed to say the same thing, because what is customary is that which is accepted as reasonable under the circumstances and is to that extent the law. In the process of centralization and concentration of law, particular customs must necessarily yield to general customs. And it is in the course of such a process that the interpretation and administration of a system of law are in danger of being dehumanized. Some imagination must be employed to bring to consciousness the myriad relations of everyday life that may be governed and controlled by a brief and highly concentrated statement of principle. It is in meet-

matters in which redress was sorely needed and had to be brought by the exceptional power of the court of chancery. But this interference of 15th century chancellors paved the way towards one of the greatest revolutions in the law; without formally enfranchising villeins and villein tenure they created a legal basis for it in the law of the realm; in the formula of copyhold — *tenement held at the will of the lord and by custom of the manor* — the first part lost its significance and the second prevailed, in downright contrast with former times when, on the contrary, the second part had no legal value and the first expressed the view of the courts. One may almost be tempted to say that these obscure decisions rendered unnecessary in England the work achieved with such a flourish of trumpets in France by the emancipating decree of the 4th of August, 1789."

[76] Vampage, Y. B. 13 HEN. VI, 21 pl. 60: "Et Sir, le Ley est fond(e) de reason, et ceo q(ue) est reason est Ley."

[77] Littleton, Y. B. 8 ED. IV, 18 pl. 30: "Custome q(ue) courge p(ur) my tout le terre est common Ley."

[78] Newton, Y. B. 22 HEN. VI, 21 pl. 38: "Quel chose e(st) custo(m)e de t(er)r(e) q(ue) le Ley de t(er)r(e). See also Fortescue, Y. B. 35 Hen. VI, 53: "Donq common reason, qui est comon Ley est, que," etc.

[79] CO., INST., 97 *b*.

ing this test that courts and lawyers have shown their greatest weakness.

"The jurists of whom Ihering made fun," says Professor Pound in another place, "have their counterpart in American judges who insist upon a legal theory of equality of rights and liberty of contract in the face of notorious social and economic facts. On the other hand, the conception of law as a means toward social ends, the doctrine that law exists to secure interests, social, public and private, requires the jurist to keep in touch with life. Wholly abstract considerations do not suffice to justify legal rules under such a theory. The function of legal history comes to be one of illustrating how rules and principles have met concrete situations in the past and of enabling us to judge how we may deal with such situations in the present, rather than of furnishing self-sufficient premises from which rules are to be obtained by rigid deduction." [80]

A justification of that uncompromising adherence to a theory of contract, to which exception is taken in the foregoing passage, is supposed by some at least to be found in the statement of Sir Henry Maine "that the movement of the progressive societies has hitherto been a movement from *status* to *contract*," [81] a statement which has received currency and been accepted as proof that it is such movement that makes societies progressive. How slight a foundation exists for such a position we have seen. In every community there are necessarily two relationships, one of individuals to each other and one of each to all the rest, that is, the community. Contract only deals with one — the relation between individuals. The other is represented by *status*. A contract, after all, is only an agreement to which the law attaches obligations under special circumstances, and, therefore, it does not explain obligations to say that the matter is a contract. The law has no difficulty in attaching obligations to a great variety of relations — they are "implied," as it is said, or "imposed by law." To impose particular obligations on particular persons in particular situations is not necessarily to enter upon an evening-up process. In the case of the ordinary contract between parties who are capable of contracting at all, the law does not impose any obligations upon one which are not imposed equally on the other, but in the relation of employer and employee the law has interposed and

[80] 26 HARV. L. REV. 140, 146. [81] MAINE, ANCIENT LAW, p. 165.

still interposes in a great variety of ways, sometimes on the side of the employer, as by the fellow-servant rule, and sometimes on the side of the employee, as by the industrial insurance laws, anti-truck acts and many varieties of factory legislation. To foreclose the discussion with the statement that the case is one of contract is, therefore, to end the argument at the point at which it should begin.

In the Village Community, in the old trading towns, the relationships between the individual and the community were visible and apparent, recognized by all and enforced by custom. So far as these customs were general they represent the common law. "The modern analysist," says Maitland, "may insist that 'the custom of the manor' is not 'law,' but mere 'positive morality'; but let him admit that it is positive morality conceived as law and little is left to quarrel over save words." [82] The extension of the radius of business operations, the removal of the seats of governmental authority to distant points, resulted in the destruction of these customs and therefore they did not find expression in the written law. Again, it was only by slow degrees that the villain peasantry among whom these customs so largely prevailed obtained recognition in the king's courts. In fact during the period of rapid expansion and growth, of abounding fields of opportunity, the need itself for the enforcement of many of the customs passed away and indeed we find statute after statute falling into disuse on this account.

Yet it must be obvious that as population increases, cities grow in size and the struggle for existence becomes more and more intense with its consequent demands for larger or more efficient units, higher types of leadership and the highest order of skill, we return to a condition that is relatively the same as that which confronted the Village Community and the old trading town. The need for emphasis upon the relation of the individual to the community and the community to the individual again becomes apparent and must be impressed upon the ministers of the common law. The community has the right to insist on law and order in industry no less than outside of it,[83] but it is vain to expect order and at the same time to deny law. Industrial order can come only when the means

[82] 1 SELECT PLEAS IN MANORIAL COURTS, p. 163.

[83] *Cf.* WEBB, INDUSTRIAL DEMOCRACY, pp. 244, 245.

are provided by which all these grievances based on a just conception of communal interest which are now left to settle themselves outside the pale of the law may be disposed of within it. This is a task well within the bounds of possible accomplishment for the reason that once the nature of business and the attitude of the common law toward it are understood not only by the courts but by the workers and by business men, there will be a natural tendency on the part of all parties to govern themselves accordingly, and the number of grievances will in consequence diminish. The decisions dealing with labor, capital, and business will themselves command increasing respect by mere force of the consistent application of intelligible principles, for the chaos and uncertainty that characterize this branch of the law to-day are largely due to the disregard of the fundamental principle of the common law that labor, capital, and business are all parts one of another, and collectively, we might almost say, are the community itself.

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